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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

This is an appeal from a declaratory judgment and injunction entered on January 9, 1975 by a three Judge District Court for the Western District of New York. That Court

declared Article IX, § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the New York Municipal Home Rule Law to be unconstitutional as in violation of the guarantee of equal suffrage under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court ordered New York State and Niagara County officials to file and implement a new Charter for the County of Niagara of the State of New York despite the fact that the Charter had not received on referendum the votes required by the New York State Constitution and by the implementing statute for adoption of a new County Charter, that is, a majority of the votes cast in the cities of the County and a majority of the votes cast in the towns.

The Opinion Below

The opinion of the District Court for the Western District of New York (Appendix A, *infra*, pp. 1a-17a) is reported at 386 F.Supp. 1.

Jurisdiction

This suit was brought under Civil Rights Act, 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). A three judge District Court for the Western District of New York was convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970). Its decision was filed November 22, 1974 (Appendix A). The judgment of unconstitutionality and mandatory injunction was entered on January 9, 1975 (Appendix B, *infra*, pp. 18a-21a).

The jurisdiction of this Court to review this judgment on direct appeal is conferred by 28 U.S.C. § 1253.

The Town of Lockport, New York and Floyd Snyder, individually as a voter of the Town of Lockport and as

Supervisor of the Town of Lockport, obtained an order from the District Court on March 5, 1975 permitting intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure. Notice of Appeal to this Court was filed and served by the intervening defendants (the appellants here) on March 6, 1975 (Appendix C, *infra*, pp. 22a-23a).

Constitutional and Statutory Provisions Involved

Article IX § 1(h)(1) of the Constitution of the State of New York provides:

> § 1. Bill of Rights for Local Governments
>
> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> • • •
>
> (h) (1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit.

Where an alternative form of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit.

Section 33(7) of the Municipal Home Rule Law of New York provides:

§ 33. Power to Adopt, Amend and Repeal County Charters

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a county charter or charter law

shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof.

Questions Presented

The following questions are presented by this appeal:

1. The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county.

Do these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. A proposed new Charter for the County of Niagara, New York, failed to obtain majority approval of the votes cast in the towns of the County, but obtained majority approval of the total votes cast in the County in a November, 1972, referendum. Voter participation in the referendum was on the assumption that the State Constitution and the Municipal Home Rule Law properly required approval of a majority of the votes cast within the towns of the County and a majority of the votes cast in the cities of the County, and that a simple majority of all votes cast in the County would not be sufficient to enact the new Charter.

Was it appropriate or within the jurisdiction of the District Court for that Court to "change the rules after the game" and to order that the proposed Charter become effective on the basis of the November, 1972, referendum, as opposed to ordering a new referendum with prior advice to eligible voters that the rules will be different and that a simple majority of all of the votes cast will constitute approval of the Charter?

3. Is this action barred by *res judicata* by reason of the District Court's dismissal on the merits of a prior action raising the same issues, seeking the same relief, and brought by the County of Niagara acting on behalf of its citizens?

Statement of Case

On November 7, 1972 a proposed Charter establishing a new county government for the County of Niagara in the State of New York was put to referendum, as required by the New York State Constitution and the Municipal Home Rule Law (*supra*, pp. 3-5). The proposed Charter would effect major changes in the form and nature of county government, creating the positions of County Executive and Comptroller, and granting to the proposed new county government general governmental powers. The proposed Charter would provide the new county government with the authority to perform substantial governmental functions, including the power to establish a tax rate, to adopt laws and procedures relating to equalization of assessments, to issue bonds, to maintain county property and roads, and to administer health and public welfare services. Under the proposed Charter the cities within the County would retain substantially greater governmental autonomy than the towns would enjoy.

Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule Law of New York provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county. There are eleven towns and three cities in the County of Niagara. The proposed Charter failed to obtain a majority of the votes cast in the towns: 10,665 voting for and 11,594 against. In the cities, the vote was: 18,220 for and 14,914 against.

Since the proposed Charter did not obtain the required affirmative votes, New York State officials refused to file the proposed new Charter as a duly enacted Local Law permitting the Charter to become effective.

On December 18, 1972, the County of Niagara (representing the citizens and voters of the County) commenced an action in the United States District Court for the Western District of New York against the State of New York, seeking a declaration that the governing New York constitutional and statutory provisions are violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution (*County of Niagara, New York v. State of New York*, Civ. 1972-656). On April 3, 1973, the District Court filed its decision that the action should be dismissed on the merits (Appendix D, *infra*, pp. 24a-28a). The Order of dismissal was entered April 3, 1973. No appeal was taken. The plaintiff-appellees here made no effort to intervene in that case for purposes of prosecuting an appeal, or otherwise.

Nevertheless, on May 4, 1973, appellees commenced this action seeking the same relief as that denied by the District Court in *County of Niagara*, on the same grounds as those

dismissed on the merits in that action. Application was made by appellees, and granted, for the convening of a three judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284.

During the pendency of this action, the same proposed new Charter for the County of Niagara was again put to referendum on November 5, 1974 in general elections. Once again, the proposed Charter failed to obtain the required majorities of votes.

On cross motions for summary judgment, the District Court noted that except for its decision in *County of Niagara:* "The precise issue here presented appears to be one of first impression." The District Court granted summary judgment to the plaintiff-appellees, holding, contrary to its decision in *County of Niagara,* that the New York State constitutional and statutory provisions governing the adoption of new county charters violate the equal protection clause of the Fourteenth Amendment. On January 9, 1975 a judgment and injunction was entered declaring those provisions to be unconstitutional and ordering the defendants to accept the Charter for filing, and to implement it, on the ground that the Charter had received a majority of the total number of votes cast in the 1972 referendum (Appendix B, *infra,* pp. 18a-21a).

The New York State Attorney General thereafter announced that an appeal would be taken to this Court, and that pending that appeal the Secretary of State would not accept the Charter for filing. Subsequently, and on or about February 13, 1975, the Attorney General announced that an appeal would not be taken. The appellants were therefore granted permission on March 5, 1975 to intervene. This appeal was filed with the United States District Court for the Western District of New York on March 6, 1975.

THE QUESTIONS PRESENTED ARE OF SUBSTANTIAL CONSTITUTIONAL IMPORTANCE

I. The Equal Protection Clause of the Fourteenth Amendment does not impinge upon the state's sovereign right to establish the structure of its subordinate governmental instrumentalities.

This is a case of first impression. It involves a proposed major enlargement and extension of the "one person, one vote" rule of *Baker v. Carr,* 1962, 369 U.S. 186, to inhibit the establishment by a state of its subordinate governmental instrumentalities.

No claim is made that the provisions of the New York State Constitution or of the New York State Municipal Home Rule Law which were declared unconstitutional by the District Court directly or indirectly deprive any citizen of voting equality with reference to the election of representatives, whether state, local or federal.

What is attacked is the acknowledged sovereign and exclusive right of a state to determine what subordinate governmental instrumentalities it will create to assist in carrying out state governmental functions, what structure those municipal facets of state government will have, and to prescribe the procedures by which it will make those determinations.

The question raised is whether the Equal Protection Clause of the Fourteenth Amendment requires a state to afford its citizens the right to determine, by election process compatible with the "one person, one vote" concept, the form or structure of municipal governments within the state. This question has not been passed upon by this Court. It is a question of extensive consequence which

merits plenary consideration. Significant issues concerning the separation of powers and the sovereign right of the state to establish and control its local governmental agencies are involved.

The decision below results in an extension of the "one person, one vote" principle and the coincident extension of judicial control into political areas never contemplated by the decisions spawning that principle. The final decision in this case will have critical and far-reaching effects on local government interrelationships within the entire State of New York. A holding of unconstitutionality here must also strike down other similar statutory provisions which provide safeguards against coerced annexation of local units by their larger neighbors. (See Section 33-a Municipal Home Rule Law of New York, Appendix E, *infra*, p. 29a). The issues are of vital importance.

With but rare exceptions, previous cases in which this Court has invoked the "one person, one vote" rule have involved the election of governmental representatives. *Baker v. Carr, supra*; *Reynolds v. Sims*, 1964, 377 U.S. 533; *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 1973, 410 U.S. 719, and cases reviewed therein. The exceptions have related to the approval of general obligation bonds, *Phoenix v. Kolodziejski*, 1969, 399 U.S. 204, and to the approval of revenue bonds, *Cipriano v. City of Houma*, 1968, 395 U.S. 701.

In no case has this Court extended or indeed presaged the extension of *Baker v. Carr* to the process of the state's selection of the form and structure of its local municipal governments.

Consideration of the issues presented on this appeal must begin with the proposition—long acknowledged by

this Court—that the states have the exclusive right and authority, without interference from the federal government or judiciary, to establish, modify or abolish local government units and structures. As the Court unanimously observed in *Gomillion v. Lightfoot*, 1960, 364 U.S. 339, 343, the creation by the state of its municipalities is "clearly a political act".

In holding that the selection of members of a county school board did not necessitate an election, and that accordingly the principle of "one person, one vote" had no relevancy, the Court began its consideration in *Sailors v. Board of Education*, 1967, 387 U.S. 105, with the observation that:

> "We start with what we said in *Reynolds v. Sims, supra*, at 575:
>
> 'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them, " and the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." '
>
> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by election. Our cases have, in the main, dealt with elections for United States Senator or Congressman (*Gray v. Sanders, supra*; *Wesberry v. Sanders*, 376 U.S. 1) or for state officers (*Gray v. Sanders, supra*) or for state

legislators. *Reynolds v. Sims, supra*; *WMCA, Inc. v. Lomenzo*, 377 U.S. 633; *Davis v. Mann*, 377 U.S. 678; *Roman v. Sincock*, 377 U.S. 695; *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713; *Marshall v. Hare*, 378 U.S. 561.

"They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials." (387 U.S. at 107-8)

The Court thus reaffirmed the essential principle stated in its *Hunter v. City of Pittsburgh*, 1907, 207 U.S. 161, decision that the "number, nature and duration of the powers conferred upon" municipalities "rests in the absolute discretion of the state".

The language of the Court in *Hunter* further reflects what must be the touchstone for review of the findings of unconstitutionality in the case at bar:

"Municipal corporations are political subdivisons of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upor these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.* In all these respects the State is supreme, and its legislative body, conforming to its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." (207 U.S. 161, at 178-9; emphasis supplied).

It is thus clear that the state, acting through and by its duly elected representatives, has the sovereign right to determine what subordinate instrumentalities it will employ to carry out its functions, and the coincident sovereign right to establish and to fix the means or procedures by which it will exercise this clearly political function. Should it desire to do so, the state would have the authority to vest in its governor, or in some designated official—elected or appointed—the authority to determine and to prescribe the form and structure of municipal governments, and no citizen could demand as a matter of constitutional right that those determinations be made by vote of local residents. The matter is clearly political, and subject to political determination. The governing constitutional requirement is not the Fourteenth Amendment. The mandate is Article IV, Section 4, of the Constitution, requiring that the state's form of government be "Republican". There is no claim here of any violation of that constitutional requirement.

Distilled to its essence, appellee's position is that no state has the constitutional right to establish and control the "number, nature and duration of the powers conferred upon" the state's subordinate governmental instrumentalities without obtaining voter approval—on a "one person, one vote" basis—of the citizens of the territory involved. There has been no holding of this Court supporting such a proposition. While the Court has repeatedly

held since *Baker* that equal suffrage is a constitutional necessity with respect to the election of government representatives, the Court has never held that the authority of the state to create and to determine the appropriate form and structure of its subordinate governmental instrumentalities is limited or proscribed by any requirement of voter approval. On the contrary, the Court has repeatedly held that such matters are purely political in nature and subject to the exclusive control of the state acting in its sovereign capacity.

The District Court here reasoned however that although the state was not constitutionally obliged to permit voter participation in the matter of prescribing the form of its subordinate units of government, if it in fact allowed any such participation, it must do so only on a "one person, one vote" basis. To reach this conclusion the District Court placed reliance on decisions of this Court which are inapposite to the issue here involved.

The District Court relied principally on the following language from *Gomillion:*

> "When a State exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.'" (364 U.S. 339, at 347-8).

The Court below acknowledges that in the creation and structuring of subordinate governmental instrumentalities the state is exercising sovereign power "wholly within the domain of state interest" which is insulated from federal judicial review. But the conclusion is then assumed that there is "a federally protected right" which is being circumvented by state power. The unanswered but dispositive question here is: What is the "federally protected right" which the state constitution and statute offend? It is not the right to participate on an equal basis in the election of representatives, for there is and can be no claim of violation of that right. It cannot be the right to participate by direct local vote in the determination of the nature of powers to be exercised by local governments, for the teaching of *Hadley, Reynolds* and *Sailors* is that no such constitutional right exists.

In *Gomillion,* the Court was dealing with the exercise of state power to effect a blatant discriminatory gerrymandering designed to deprive black voters of their franchise to elect government representatives. The federally protected right in *Gomillion* is the undisputed constitutional right of all voters to participate on an equal basis in the selection of elected representatives. That issue—that "federally protected right"—is not involved in this case. The appellees do *not* have a "federally protected right" to participate by direct vote in the structuring of the state's local governmental units.

Moreover, no "unlawful end" is being accomplished by the New York Constitution or its Home Rule Law. The end here is the establishment or modification of subordinate local government—a legal end as to the accomplishment of which the state concededly has full and exclusive power.

Nor is any constitutional power being "used by way of condition to attain an unconstitutional result". The result here is not unconstitutional. The state has the right to create its own subordinate government units on such terms as it may select provided only that the citizens of the state are afforded a "Republican Form of Government" within the meaning of Article IV of the Constitution. With or without the proposed new Charter, Niagara County is and would be governed by a "Republican Form of Government" through a legislative body selected in accordance with the "one person, one vote" mandate.

Gomillion does not stand as authority for the District Court's decision in this case. Indeed, it militates strongly against that decision.

Nor is the determination below either mandated or supported by *Gray v. Sanders*, 1962, 372 U.S. 368, or by *Avery v. Midland County*, 1967, 390 U.S. 474. In *Gray*, the Court was again reviewing the process of election of government representatives, holding that since Georgia regulated the conduct of party primaries through exercise of state powers, its action with respect to that part of the representative election process was state action, thus affording standing to sue to any citizen whose right to vote for such elected representatives was impaired by that state action. The protected right involved in *Gray* as well as in *Avery* is the right of the citizen to vote on an equal basis with all other voters for elected representatives, and not to have state action debase or dilute that specific constitutionally protected right. The charter referendum procedures in New York in no way impinge upon that existing, insured right.

It is not a matter of semantics to urge upon this Court the proposition that the determination of the form and structure of subordinate state government instrumentalities is a political matter over which the people of the state as a whole, by exercise of their political rights, have exclusive control.

The New York State procedure under review was designed and operates to require something more than a mere majority approval to effect a change in the form of county government and consequent changes in the interrelationships between county authority and city, town and village authority. *Gordon v. Lance*, 1971, 403 U.S. 1. The procedure recognizes that the needs of localities are often best served by the exercise of governmental power by smaller political units which are closer to the people, more intimately familiar with their local problems and needs, and more directly responsive to the people. *Dusch v. Davis*, 1966, 387 U.S. 112. The procedure was designed to exercise the state's sovereign right in such a fashion that neither the city dwellers' rights with respect to city government, nor the town dwellers' rights with respect to town government, could be overridden without mutual consent. *Salyer Land Co. v. Tulare Water District, supra.*

This Court has not yet stripped the states of all governmental discretion and flexibility even in situations involving the election of representatives. In *Salyer* it was held that the "popular election requirements enunciated by *Reynolds*" were inapplicable to general elections of a Water Storage District, and that California could constitutionally limit the vote to landowners as distinguished from nonlandowners and lessees. Of course, the challenged New York constitutional and statutory provisions do not go so far. No voter qualified to vote in general elections is prohibited

from voting. The dual majority provisions provide a system of "checks and balances" while granting voter participation in matters where no constitutional right to vote exists.

The "one person, one vote" principle is surely not some omnipresent, all encompassing, all governing presence hovering over and intruding into all state and local functions and activities. *Cipriano* and *Kramer v. Union Free School District No. 15,* 1969, 395 U.S. 621, tell us that in particular circumstances, outright exclusions of qualified voters may be "necessary to promote a compelling state interest" (at 627). In *Wells v. Edwards,* 1973, 409 U.S. 1095, Louisiana constitutional provisions for the election of state Supreme Court Justices from election districts established without regard to population, were upheld in the face of a "one person, one vote" attack. See *Fortson v. Morris,* 1966, 385 U.S. 231.

In *Dusch,* the Court upheld an election plan for the selection of representatives which was in part based on candidate borough residency requirements, without regard to population, observing that the plan ". . . seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megolopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. 112, at 117).

The restraining and tempering views of the Court as expressed in *Sailors,* must not be lost in pursuit of a simplistic and insensitive extension of a principle beyond the bounds of its reason d'etre:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." (387 U.S. 105, at 111)

What would the Court say if the provisions under attack required not a dual majority but a 60% or 65% or 70% majority vote of the whole? Depending on the population mix of the particular county, the city or town residents might be heard to complain that a disproportionate weighting was being accorded to the numerically smaller group. The same cries of "veto power" and deprivation of equal suffrage as are made in this case would be heard. But, the Court would say, as it should here:

> "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue" (*Gordon v. Lance,* 403 U.S. 1, at 6, upholding a 60% referendum approval of bonded indebtedness or increases in tax rates).

The procedure adopted by the people of New York State recognizes that there are in fact important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government could be superimposed or modified, a majority of the voters in the towns approve, and a majority of the voters in the cities approve. This is a reasonable and responsible exercise of the state's sovereign political right to determine its own form of government.

Nor can it be claimed that the urban resident is disadvantaged by this procedure. The basic constitutional provi-

sions were adopted and approved by the voters of the state as a whole acting on referendum as recently as 1963 (Article IX, Section 1, added 1963, McKinney's Consolidated Laws of New York, Book 2, Constitution). The procedure is subject to change by the same political means by which it was initially adopted. There is a constitutionally appropriate means of political change. Since approximately 10.6 million people reside within the cities of the state, while approximately 7.5 million live in the towns, urban voters have the numerical potential to effect such change if desired (New York State Constitution, Article XIX).

Since 1965, new charters for county government have been proposed to the citizens of 14 counties. Three charters were adopted by obtaining the complementary dual majority votes required. Eight charters failed to obtain a majority vote in either the towns or in the cities of the county. One failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of town voters. This experience demonstrates that the provisions in question do not operate to the advantage or disadvantage of any defined group of citizens.

The proposed Niagara County Charter involves major modifications in political approach. It would effect the realignment and transference of existing government functions and prerogatives among and from local government units to the proposed county government unit. The citizens residing in the towns within the county have a direct stake in their existing town governments and in the powers and authorities with which those governments operate. The same is true of city residents with respect to city governments. Accordingly, it is altogether proper to require the unit majority approval of these two classes of government

instrumentalities to the superimposition of a new county government which would have very material effects on existing local control of local matters, and on the responsibility for and payment of various services. The complementary majority approval procedure is justifiable even if the "one person, one vote" concept were to have application to this kind of state political action.

II. Assuming the validity of the decision below, the District Court has improperly pre-empted the role and rights of the electorate.

Essential to the integrity of any voting process is knowledge on the part of those qualified to vote as to the consequences and effect of the vote cast or not cast. As in any situation, to obtain a *bona fides* result, those involved and affected must "know the rules of the game" before the game is played.

The voters of Niagara County were not once, but twice, offered the proposed new Charter in referenda held on the basis that to become effective, the Charter must obtain the dual majority required by the State Constitution. Votes were cast or not cast in reliance on that premise. Pre-referendum political efforts at persuasion or education were also based on the proposition that the Charter could not become effective without the dual majority. The referendum was *not* conducted, and the voters did *not* act, on the premise that a simple majority of the total votes cast countywide would be sufficient to provide approval.

The District Court, however, changed the rules after the game was twice played and held that under new and different rules, pursuant to which no voter had acted, the proposed Charter had gained approval. In so doing, the Dis-

trict Court to make decisions and to take actions (both before and at the time of the referendum) with knowledge of what the requirements for approval are.

The relief granted by the District Court assumes an unproven and unprovable conclusion: that the results of the referendum would have been the same if the voters had known in advance that the rules were different than they thought and that a simple majority would control. Equality of voting rights and the "one person, one vote" concept necessitate an exercise of the voting prerogative with advance knowledge of the consequences of the vote cast.

It was improvident and violative of voter rights for the District Court to order the Charter to become effective without a referendum on the new terms prescribed. Even if the finding of unconstitutionality had merit, the equitable and proper relief would be to order or permit a new referendum based on the new rules. *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

III. This action is barred by *res judicata*.

Standing alone, the *res judicata* bar of the District Court's earlier decision on the same subject in *County of Niagara v. State of New York, supra,* would not warrant plenary review of that same Court's contrary decision in the present case. The judgment below should, however, be summarily reversed on that ground.

In the decision below, the District Court stated the law with respect to *res judicata* as follows:

> "Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a 'final judgment on the merits' in the prior action; (2) identical issues sought

> to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. *Kreager v. General Electric Company,* 497 F.2d 468, 471-72 (2 Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944, 955 (2 Cir.), *cert. denied,* 377 U.S. 934 (1964)."

The District Court found that the present plaintiff-appellees were not in privity with the County of Niagara in the prior action and thus declined to apply the bar of *res judicata.* However, the opening sentence of the District Court's decision in *County of Niagara v. State of New York* is: "Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York."

The County of Niagara took the same position and sought the same relief as plaintiff-appellees do in the instant case. The precise constitutional issues raised here were raised and determined there. The plaintiff-appellees here were aware of the pendency of the Niagara County suit but made no effort to gain intervention on the ground that their rights were not being protected by the County. The present action was filed only after the judgment in the Niagara County action had become final. The present plaintiff-appellees are citizens of the County of Niagara and purport to sue in that capacity as well as on behalf of all others similarly situated. The County of Niagara represented the same constituency. For the sake of the integrity of the judicial process, this proceeding should be barred by *res judicata.*

Conclusion

This appeal raises issues of fundamental constitutional importance which have not heretofore been considered by this Court. The resolution of these sensitive issues concerning the nature of our federal system and the separation of powers is of direct and vital importance not only to the people of the State of New York, but also to the people of the United States as a whole. Plenary consideration should be had by this Court.

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants Town of Lockport and Floyd Snyder.

May, 1975.

APPENDIX A

Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

CITIZENS FOR COMMUNITY ACTION AT the LOCAL LEVEL, INC., and Francis W. Shedd, Individually and on Behalf of all others similarly situated,
Plaintiffs,

v.

John J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants.

Civ. A. No. 1973-222.

United States District Court,
W. D. New York.

Nov. 22, 1974.

386 F. Supp. 1.

John J. Phelan, Buffalo, N. Y. (Moot, Sprague, Marcy, Landy, Fernbach & Smythe, Buffalo, N. Y., of counsel), for plaintiffs.

Michael G. Wolfgang, Asst. Atty. Gen., State of New York, Buffalo, N. Y. (Louis J. Lefkowitz, Atty. Gen., State of New York, New York City, of counsel), for defendants Ghezzi and Levitt.

Miles A. Lance, Asst. Niagara County Atty., Lockport, N. Y. (Samuel L. Tavano, Niagara County Atty., of counsel), for defendants Graf and Comerford.

Appendix A—Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

Before TIMBERS, Circuit Judge, and BURKE and CURTIN, District Judges.

TIMBERS, Circuit Judge:

QUESTIONS PRESENTED

On these cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1), of the Constitution of the State of New York (McKinney 1969)[1] (hereinafter, New York Constitution), and Section 33(7) of the New York Municipal Home Rule Law (McKinney Supp. 1974-75)[2]

[1] Article IX, § 1(h)(1), of the Constitution of the State of New York provides in pertinent part:

> "Counties . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government . . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

[2] Section 33(7) of the New York Municipal Home Rule Law provides in pertinent part:

> "7. A charter law
>
> (a) providing a county charter . . .
>
> (b) . . . shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the

(Footnote continued on following page)

Appendix A—Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

(hereinafter, Home Rule Law), the following are the essential questions presented:

(1) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as are raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

(2) If not, whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

For the reasons stated below, we hold that the instant class action is not barred by dismissal of the prior action brought by Niagara County and that the challenged dual majority requirement impairs plaintiffs' constitutional rights in the respects claimed.

Accordingly, we grant plaintiffs' motion for summary judgment and deny defendants' cross motion for summary

(Footnote continued from preceding page)

> board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit. . . ."

judgment; we hold that Article IX, § 1(h)(1), of the New York Constitution, and its implementing statute, Section 33(7) of the Home Rule Law, violate the equal protection clause of the Fourteenth Amendment; and we order defendants to accept for filing, and to implement, the Niagara County Charter as approved by a majority of the popular vote in the county-wide referendum held on November 7, 1972.

PARTIES TO THE ACTION

[1] Plaintiffs are Citizens For Community Action At The Local Level, Inc. (CALL), a New York membership corporation, organized for the purpose of securing a county form of government for Niagara County; and Francis W. Shedd, a resident of the City of Niagara Falls, Niagara County, who voted in favor of the adoption of the Niagara County Charter in the November 1972 referendum. Shedd sues for himself and as representative of a class consisting of those residents of Niagara County whose votes for the County Charter allegedly were impaired by the dual referendum requirement. As individuals who allege that their vote was unconstitutionally diluted and debased, Shedd and the plaintiff class have standing to sue. Gray v. Sanders, 372 U.S. 368, 375 (1963).[3]

[3] While we find it unnecessary to reach the issue, there is some question as to whether an organization has standing to represent its members in certain cases under the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343 (3) (1970). E.g., Warth v. Seldin, 495 F.2d 1187, 1190-95 (2 Cir.), cert. granted, ____ U.S. ____ (1974); Aguayo v. Richardson, 473 F.2d 1090, 1098-1101 (2 Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

Defendants are John J. Ghezzi, Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the Niagara County Legislature; and Kenneth Comerford, County Clerk of Niagara County, in whose office a local law must be filed in order to become effective.

JURISDICTION

[2] This court has jurisdiction over the subject matter and the parties pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343(3) (1970).

[3] Since the action seeks injunctive relief with respect to provisions of a New York statute and the New York Constitution, a special statutory district court of three judges was convened to hear and determine the action pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

FACTS

The essential facts alleged in the amended complaint are admitted and may be briefly summarized.

On November 7, 1972, a proposed charter providing for local government, to be known as the Niagara County Charter, was presented to the voters of Niagara County at a county-wide referendum for adoption. Pursuant to the proposed charter, the people of Niagara County would have been entitled to vote for the offices of County Executive and Comptroller. Moreover, the unit of local government provided for in the proposed charter would have had general governmental powers and would have performed sub-

stantial governmental functions, including establishment of a tax rate, equalization of assessments, issuance of bonds, maintenance of county property and roads, and the administration of health and public welfare services.

Although a majority of the county-wide vote favored adoption of the charter form of local government, the separate majority of voters in the areas of Niagara County outside of the cities voted against adoption.[4] Accordingly, the proposed charter was not accepted for filing and ultimate implementation by defendants because of non-compliance with the dual majority requirement of § 33(7) of the Home Rule Laws.

On December 18, 1972, the County of Niagara, purporting to represent its "citizens and voters", commenced an action in the district court, seeking, inter alia, a declaration that Article IX, § 1(h)(1), of the New York Constitution, and § 33(7) of the Home Rule Law were unconstitutional as violative of the one man, one vote principle. That action was dismissed on the merits by Judge Henderson. County of Niagara, New York v. State of New York, Civil 1972-656 (filed April 3, 1973)[5] (hereinafter, *County of Niagara*). On May 4, 1973, plaintiffs commenced the instant action seeking essentially the same relief.

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[4] The vote on the proposed charter was as follows:

	For	*Against*
Cities	18,220	14,914
Areas outside of cities	10,665	11,594
Total	28,885	26,508

The electors of the County approved the charter by a county-wide plurality of 2375 votes.

[5] The County did not appeal from the judgment of dismissal despite the request by plaintiff Shedd that it do so.

CLAIMS OF THE PARTIES

Plaintiffs' essential claim is that Article IX, § 1(h)(1), and § 33(7) deny them equal protection of the laws because they violate the one man, one vote principle. In support of this claim, plaintiffs point out that, pursuant to the challenged provisions, Niagara County is partitioned into two separate voting units of unequal population, one consisting of the cities within Niagara County and the other consisting of the areas of the county outside of the cities; and that the challenged provisions require a majority vote in each unit, regardless of the total popular vote, for adoption in a county-wide referendum of a county charter form of government having general governmental powers.

Accordingly, plaintiffs demand a declaratory judgment (1) that the challenged constitutional and statutory provisions deny them equal protection of the laws in violation of the Fourteenth Amendment; (2) that the Niagara County Charter was duly adopted by a majority affirmative vote in the county-wide referendum held on November 7, 1972; and (3) that the Charter is in full force and effect as the instrument defining the form of local government for Niagara County. In addition, plaintiffs demand an injunction (1) directing defendants to file and implement the Niagara County Charter as adopted; and (2) directing that an election for the offices of County Executive and Comptroller as provided in the charter be held forthwith.

Defendants' position is twofold. They assert, first, that the instant action is barred by dismissal of the prior action brought by the County of Niagara purportedly on

behalf of citizens and voters raising substantially the same issues. Second, with respect to the merits of plaintiff's constitutional claims, defendants assert (1) that, in adopting constitutional and statutory provisions which prescribed procedures to be followed by a county in adopting a new form of government, the State of New York was exercising sovereign powers solely within the domain of state interests and therefore such provisions are insulated from judicial scrutiny; and (2) that a county-wide referendum for the adoption of a form of local government having general governmental powers, as opposed to an election of representatives in such a governmental structure, need not comply with the one man, one vote principle.

The claims of the respective parties are before us on cross motions for summary judgment.

DEFENDANTS' RES JUDICATA DEFENSE

Before reaching the merits of plaintiffs' constitutional claim, our threshold inquiry must be directed to the question of whether plaintiffs in the instant action are barred from relitigating issues considered and rejected by the district court in the prior action, County of Niagara, New York v. State of New York, *supra*.

[4] Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a "final judgment on the merits" in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is

asserted must have been a party to or in privity with a party to the prior action. Kreager v. General Electric Company, 497 F.2d 468, 471 (2 Cir. 1974), quoting from Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 955 (2 Cir.), cert. denied, 377 U.S. 934 (1964).

In the instant action, the first two factors stated above are conceded by plaintiffs. There was a final judgment on the merits in *County of Niagara* and the constitutional issues raised and decided there are essentially identical to those presented here.

As for the third requirement of *Kreager*, we hold that the private citizens who are members of the plaintiff class in the instant action are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to that action and there is no basis upon which to hold them in privity with Niagara County. See Williamson v. Bethlehem Steel Corp., 468 F. 2d 1201, 1203-04 (2 Cir. 1972), cert. denied, 411 U.S. 931 (1973); 1B Moore, Federal Practice ¶ 0.411 [1] (2d ed. 1974).

[5, 6] Absent statutory or contractual authority, a person ordinarily cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purported to represent all individuals who share an interest in the subject matter of the action. Dudley v. Meyers, 422 F.2d 1389, 1393-94 (3 Cir. 1970); 1B Moore, *supra*, ¶ 0.411 [1], at 1253, and ¶ 0.411[3], at 1423. Cf. Kersh Lake Drainage

District v. Johnson, 309 U.S. 485 (1940); United States v. Kabinto, 456 F.2d 1087 (9 Cir.), cert. denied, 409 U.S. 842 (1972). Here there is no claim either that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters" or that any member of the present plaintiff class consented to being represented in the prior action by the County.[6]

Defendants argue, however, that we must look through form to substance and they urge us to characterize *County of Niagara* as a class action. If that were a true class action, and assuming appropriate notice, cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974), vacating 479 F.2d 1005 (2 Cir. 1973), and adequate representation, e. g., Hansberry v. Lee, 311 U.S. 32 (1940), the prior judgment would be binding on the plaintiffs here. The short answer to defendants' claim, however, is that *County of Niagara* was not brought pursuant to Fed.R.Civ.P. 23. Thus, the district court in the prior action was not called upon to make such critical initial determinations under Rule 23 as to whether the County could or would "fairly and adequately protect the interests of the class" claimed by defendants to have been represented. Fed.R.Civ.P. 23(a)(4). Nor was the court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to members of the class, Fed.R.Civ.P. 23(d)(2); cf. Eisen v. Carlisle & Jacquelin, *supra*, or to deal with similar procedural matters. Fed.R.Civ.P. 23(d)(5).

[6] Indeed, it is not at all clear that the County of Niagara had standing to represent the interests of its citizens and voters in the prior action. Note 3 *supra*.

In short, we hold that (1) because the plaintiffs here were not parties to *County of Niagara*, (2) because the County had no valid authority to sue on behalf of its citizens and voters, and (3) because the prior action was not a proper class action brought pursuant to Rule 23, the third requirement of *Kreager* has not been satisfied. Defendants' defense of res judicata must fail.

PLAINTIFFS' CONSTITUTIONAL CLAIM

The gravamen of plaintiffs' complaint is that, by partitioning Niagara County into two separate voting units of unequal population consisting of the urban areas of the county on one hand and the rural areas on the other, and by requiring separate majorities in each for the adoption of a county charter form of local government having general governmental powers, Article IX, § 1(h)(1), and its statutory implementation, § 33(7), create arbitrary and irrational classifications based solely upon residence which result in a constitutionally impermissible voting pattern.

Defendants, on the other hand, claim that, since counties are no more than subordinate governmental instrumentalities which are created by the state and which hold and exercise power subject to its sovereign will, their internal governmental structure and the procedure for adopting it are not subject to federal judicial scrutiny. In the alternative, they contend that the one man, one vote principle does not apply to the selection of a form of government.

The precise issue here presented appears to be one of first impression.[7] The Supreme Court, however, repeatedly has ruled on the scope and meaning of the one man, one vote principle in numerous decisions since the seminal case of Baker v. Carr, 369 U.S. 186 (1962). Reasoning by analogy from those cases, we hold that the dual majority requirement of Article IX, § 1(h)(1), of the New York Constitution and § 33(7) of the Home Rule Law is not insulated from judicial scrutiny and is unconstitutional because it violates the one man, one vote principle.

[7, 8] Defendants' claim that the challenged state procedure for adopting new forms of local government is immune from judicial scrutiny is wholly without merit. We recognize the sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions. From this it does not follow, however, merely because subordinate governmental instrumentalities exist subject to the state's sovereign will, that a state may exercise that will so as to impair constitutionally protected rights of its citizens. As the Supreme Court stated in Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960):

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end. United States v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.' Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114."

[7] With the exception, of course, of *County of Niagara*, the prior action.

Applying the principle of *Gomillion* in Gray v. Sanders, *supra*, the Supreme Court held that, although the State of Georgia was under no obligation to adopt a state primary procedure for the nomination of a candidate for federal and statewide officers, once it has done so the state was required to give "all who participat[ed] in the election . . . an equal vote . . ." 372 U.S. at 379. Similarly, in Avery v. Midland County, 390 U.S. 474, 480 (1968), the Court held that:

> "[W]hen the State delegates law-making power to local government and provides for the election of local officials . . ., it must insure that those qualified to vote have the right to an equally effective voice in the election process."

[9] The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision.

We turn next to the question whether the one man, one vote principle of Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny, has been violated by the dual majority

requirement which, as here applied, has had the effect of diluting the votes of the city dwellers of Niagara County by permitting the minority rural voters to veto the adoption of the proposed charter.

Defendants concede that the requirements of Article IX, § 1(h)(1), and § 33(7) would violate that principle if applied to an election of representatives. They seek to distinguish the *Gray-Reynolds-Avery* line of cases, however, on the ground that they did not involve the selection by popular vote of a form of government. They argue further that the more recent decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973), and Gordon v. Lance, 403 U.S. 1 (1971), portend a willingness on the part of the Court to sanction greater flexibility in the one man, one vote principle. They say that the dual majority requirement here challenged would pass muster under those recent decisions. We disagree.

[10, 11] The fact that the referendum here in question did not involve election of representatives is not fatal to plaintiffs' complaint. The Supreme Court has applied the one man, one vote principle to non-representational referenda. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bonds); Gordon v. Lance, *supra* (municipal bonds and tax rates); Cipriano v. City of Houma, 395 U.S. 701 (1969) (municipal utility revenue bonds). Nor are we persuaded by defendants' tenuous argument that the principle is inapplicable here because the challenged referendum involved not the incurring of debt

but the adoption of a form of local government. Defendants have suggested no reason grounded on precedent or policy why such a referendum, which would have created the elective offices of County Executive and Comptroller need not conform to the one man, one vote principle, while the direct election of those officials would have been required to conform. E.g., Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, *supra*. We find no merit in the suggested distinction.

Defendants place heavy reliance on what they claim is the new flexibility of the one man, one vote principle as reflected in the decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, *supra*, and Gordon v. Lance, *supra*. We think such reliance, in the context of the instant case, is misplaced.

In *Salyer* the Supreme Court upheld California statutes which limited the franchise with respect to the management of local water storage and flood control units to land owners of the district "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group . . ." 410 U.S. at 728. Unlike the situation in *Salyer*, the functions which were to have been performed by the county government provided for in the proposed Niagara County Charter were of a general governmental nature. Such governmental functions clearly would have affected all residents of Niagara County. If *Salyer* is relevant at all, it would seem to support plaintiffs' position.

Defendants place their greatest reliance on *Gordon*. There the Supreme Court upheld West Virginia's constitutional and statutory requirement that political subdivisions not incur bonded indebtedness or raise tax rates beyond a stated maximum unless the proposals are approved by 60% of the popular vote. The rationale of *Gordon* is that a state has the right to protect minority interests and those of unborn generations, in certain substantive areas, by requiring a greater than majority vote.

Reasoning by analogy from *Gordon*, defendants argue that, because of the potential long-range, untold consequences of a referendum such as that here involved, the state was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that, since each of the separate voting units within Niagara County might have vetoed the adoption of the charter, the dual majority requirement did not "authorize discrimination against any identifiable class", Gordon, *supra*, 403 U.S. at 7, and therefore did not violate the Fourteenth Amendment.

At first blush, this argument would appear to have merit. Upon more careful analysis, however, we find *Gordon* to be distinguishable in these material respects:

> First, the dual majority requirement does not provide, as defendants suggest, for a simple super-majority vote. Under Article IX, § 1(h)(1), and § 33(7), there is no limit whatever to the minority domination and to the dilution of the majority vote. The Supreme Court specifically declined to consider the constitutionality of such unlimited minority veto. *Gordon, supra*, 403 U.S. at 8 n. 6.

> Second, unlike the situation in *Gordon*, the dual majority requirement, as here applied, indeed did discriminate against, and did dilute and debase the vote of, an identifiable group, i.e. the city dwellers of Niagara County.
>
> Third, the Court in *Gordon* reaffirmed, without qualification, its holdings in prior cases where an impermissible "dilution of voting power [was found] because of group characteristics—geographic location . . .—that bore no valid relation to the interest of those groups in the subject matter of the election . . ." 403 U.S. at 4. See Cipriano v. City of Houma, *supra*; Gray v. Sanders, *supra*.

[12] We hold that defendants in the instant case have failed to sustain their heavy burden of demonstrating that the urban-rural voter unit classification imposed by Article IX, § 1(h)(1), and § 33(7), bears any relationship to, or is in any way justified by, the interests of each group in the creation of a county-wide governmental structure.

The Clerk will enter judgment for plaintiffs in accordance with this opinion. No costs.

APPENDIX B

Declaratory Judgment and Injunction

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants.

Civil Action No. 1973-222.

This cause came on to be heard, before a statutory three judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) consisting of The Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and The Honorable Harold P. Burke and The Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, upon cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1 (h) (1) of the Constitution of the State of New York and § 33 (7) of the New York Municipal

Home Rule Law and the court having considered the issues and an opinion having been filed on the 22nd day of November, 1974 written by The Honorable William H. Timbers, U.S.C.J. in which The Honorable Harold J. Burke, U.S.D.J. and The Honorable John T. Curtin, U.S.D.J. concurred,

NOW upon the complaint in the action and upon the answers of each of the defendants and upon the cross motions for summary judgment and oral argument having been heard by the special statutory district court on the 20th day of June, 1974, at the United States Court House in Buffalo, New York, at which time the plaintiffs were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe of Buffalo, New York and the defendants John J. Ghezzi, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney General of the State of New York, Michael G. Wolfgang, Assistant Attorney General, of counsel and the defendants LaVerne S. Graf, Clerk of the Niagara County Legislature and Kenneth Comerford, County Clerk of Niagara County were represented by Samuel L. Tavano, County Attorney, County of Niagara, Miles A. Lance, Assistant County Attorney of counsel, and due deliberation having been had, it is therefore

ORDERED that the motion of the plaintiffs for summary judgment be and it hereby is granted and the motion of the defendants for summary judgment be and it hereby is denied and further, it is hereby

Appendix B—Declaratory Judgment and Injunction

ADJUDGED and decreed that:

1. Article IX § 1 (h) (1) of the Constitution of the State of New York and § 33 (7) of the Municipal Home Rule of the State of New York [35c McKinney's Consolidated Laws of New York, § 33 (7)] are unconstitutional in violation of the guarantee of equal suffrage contained in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and

2. The application of Article IX § 1 (h) (1) of the New York State Constitution and § 33 (7) of the Municipal Home Rule Law of the State of New York [35c McKinney's Consolidated Laws of New York] to the vote upon a referendum for a Niagara County Charter in the 1972 general election has denied the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and

3. The Niagara County Charter was duly adopted by a majority affirmative vote in the countywide referendum held on November 7, 1972 and

4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further

ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972

Appendix B—Declaratory Judgment and Injunction

and which local law was approved by a majority of the popular vote in such election.

WM. H. TIMBERS
WILLIAM H. TIMBERS
United States Circuit Judge

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

Dated: January 9, 1975.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of The Town of Lockport,
Intervening Defendants.

Civil Action No. 1973-222.

Notice is hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the final judgment entered in this action on January 9, 1975 declaring Article IX Section 1(h)(1) of the Constitution of the State of New

Appendix C—Notice of Appeal to the Supreme Court of the United States

York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35 c McKinney's Consolidated Laws of New York, Section 33(7)] unconstitutional as being in violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution, declaring a proposed Charter for Niagara County to be duly adopted, and enjoining and directing the above-named defendants to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County.

This appeal is taken pursuant to 28 U.S.C.A. Section 1253.

Dated: Buffalo, New York, March 6, 1975.

VICTOR T. FUZAK
VICTOR T. FUZAK, ESQ.

for

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

and

ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON

Attorneys for Intervening Defendants

APPENDIX D

Decision, April 3, 1973, District Court of the Western District of New York, *County of Niagara v. State of New York* (Civil 1972—656)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

COUNTY OF NIAGARA, NEW YORK,

Plaintiff,

vs.

STATE OF NEW YORK,

Defendant.

Civil 1972-656

Appearances:

Samuel L. Tavano, Niagara County Attorney (Miles A. Lance, Assistant County Attorney, of Counsel), Lockport, New York, for Plaintiff.

Louis J. Lefkowitz, Attorney General of the State of New York, (William J. Kogan, Assistant Attorney General, of Counsel), Albany, New York, for Defendant.

Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9 (h) (1) of the New York State Constitution and section 33 (7) of the Municipal

Appendix D—Decision, April 3, 1973, District Court of the Western District of New York, County of Niagara v. State of New York (Civil 1972—656)

Home Rule Law of the State of New York. Because the claim directs a constitutional attack upon a state constitutional provision and a state statute plaintiff also asks that a three judge court be convened, pursuant to 28 United States Code, section 2281. Defendant has moved to dismiss the complaint.

This case arose out of a referendum held at the November 7, 1972 elections in which a proposed new county charter was presented to the voters of Niagara County. The proposed charter would amend the present form of government in Niagara County by creating the offices of county executive and county controller, and by extending the term of office of county legislators from two to four years. Although the county-wide vote resulted in a majority in favor of adoption of the proposed charter, the vote in the areas outside the cities, when taken as a unit, resulted in a majority against the adoption of the proposed charter.

In December, 1972 the new charter was presented to The Secretary of State of the State of New York for filing. The Secretary of State refused to file the new charter because County of Niagara officials could not certify that it had been passed by a majority vote both in the cities of the county and in the area outside the cities, each considered as an independent unit. This action was taken by the Secretary of State pursuant to section 33 of the Municipal Home Rule Law, Subdivision 7, which provides as follows:

> 7. A charter law
>
> (a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisons thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter . . . . If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit . . . .

This statute was enacted pursuant to Article 9, Section 1, subdivision (h) (1) of the New York State Constitution, which provides:

"(h)(1) Counties, . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government. . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

Plaintiff contends (1) that section 33 (7) of the Municipal Home Rule Law was enacted in violation of Article 9 (h) (1) of the New York State Constitution, since the state

constitution did not contemplate that separate majorities would be required to adopt a new charter that did not provide for a transfer of functions to or from the county or the cities or the towns; (2) that even if the state constitution is construed to permit such legislation, both the state constitutional provision and the section of the Municipal Home Rule Law in question violate the due process and equal protection clauses of the United States Constitution, as interpreted by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, and subsequent cases; (3) even if both the state constitutional provision and the state statute are held to be constitutional, the proper construction of section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and areas outside the cities are required only if functions or duties are transferred to or from those entities to the county by provisions of the proposed charter.

With regard to plaintiff's second claim, it is true that in *Baker v. Carr, Id.*, and in subsequent cases the Supreme Court set forth the principle that in statewide and congressional elections, one person's vote must be counted equally with those of all other voters in a state. See, *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533. However, the one man one vote concept is not without its limits. In *Wells. v. Edwards*, 41 U.S.L.W. 3370 (U.S. Jan 9, 1973) the court refused to apply the concept of one man one vote to the establishment of districts for the election of judges.

This case deals with a referendum held for the purpose of obtaining voter approval of a new form of county government. A county, being a political subdivision of a state,

Appendix D—Decision, April 3, 1973, District Court of the Western District of New York, County of Niagara v. State of New York (Civil 1972—656)

is, in a sense, a creature of that state. *cf. Trenton v. New Jersey*, 262 U.S. 182. The State of New York has adopted a constitutional provision allowing counties within the state to create alternate forms of government. The New York State legislature has acted to implement that state constitutional provisions by enacting the Municipal Home Rule Law, which further spells out the procedures to be followed by a county in adopting a new form of government. The State of New York was acting within its sovereign power in adopting the constitutional and statutory provisions referred to above. Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

Title 28, United States Code section 2281 does not require the convening of a three judge court when the constitutional attack upon a state statute is insubstantial. *Bailey v. Patterson*, 369 U.S. 31; *Goosby v. Osser*, 41 U.S. L.W. 4167 (U.S. Jan. 17, 1973). The facts presented by this case do not raise a substantial federal question.

In light of the foregoing, this court does not reach the other contentions of the Plaintiff. Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted.

It is so ordered.

JOHN O. HENDERSON
United States District Judge

Dated: April 3, 1973.

APPENDIX E

Section 33-a Municipal Home Rule Law of New York

§ 33a. Transfer of Functions or Duties of Local Governments and Districts

1. Subject to restrictions in the constitution, in this article or in any other applicable law, the board of supervisors of any county may, by local law, transfer functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other, or for the abolition of one or more offices, departments or agencies of such units of government when all their functions or duties are so transferred.

2. Any such local law, or an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county or of the cities, towns, villages, districts or other units of government wholly contained in the county, shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon: (a) in the area of the county outside of cities and (b) in the area of cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a local law, amendment or repeal thereof, shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors.